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In the Supreme Court of the United States

OCTOBER TERM 1963

No. 819

IRVING MARDER,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

APPEAL FROM THE SUPERIOR COURT
OF SUFFOLK COUNTY, MASSACHUSETTS

OPPOSITION TO MOTION TO DISMISS APPEAL

IRVING MARDER
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I. THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE TIMELY AND PROPERLY RAISED.

There are two ways in which a Federal question can be raised so that it is properly before the United States Supreme Court on appeal under 28 U.S.C.A. Sec. 1257 (2). One way is for it to be raised in the trial court "with fair precision and in due time" or in some manner showing the "clear intendment" of the Appellant.

> "... No particular form of words or phrases is essential, but only that the claim of invalidity and the

ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented . . ."

Bryant v. *Zimmerman* (1928) 278 U.S. 63, 67.

The other way is for it to be apparent from the opinion of the appellate court that the question was considered by it.

Charlestown Association v. *Alderson* (1944) 324 U.S. 180, 185, 186
Harding v. *Illinois* (1904) 196 U.S. 78, 85-88.

Your appellant contends that, in substance if not by specific words of art, and in essense if not by number, he did clearly raise his Federal constitutional objections with definite indications as to the nature of, and the basis for, such objections, when he was in the trial court.

See Motion to Dismiss in Jurisdictional Statement, p. 5, ¶2

". . . Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient . . ."

Dewey v. *Des Moines* (1898) 173 U.S. 193, 199;
See *Chicago, Burlington &c. . . R'd* v. *Chicago* (1896) 166 U.S. 226, 231, 232.

But if appellant acted inadequately to raise the federal question in the trial court, his inadequacy was cured by the Massachusetts Supreme Judicial Court in its opinion, wherein it recognized that he had, in said Motion, raised the questions of "Equal protection of the laws" and "Due process of law . . .".

Jurisdictional Statement p. 14

Thereby the Supreme Judicial Court made reference to the Federal Constitutional questions involved, if not by number at least by use of the specific phrases employed in such sections—phrases never specifically used, though embodying concepts undoubtedly envisaged, in the Massachusetts Constitution.

Bryant v. *Zimmerman* (1928) 278 U.S. 63, 69.
See *Puglisee* v. *Commonwealth* (1957) 335 Mass. 471, 474, 475; 140 NE 2d 476, 479.

In further support of Appellant's position, it is noted that there is now included with the record a letter or certificate on stationery of the Massachusetts Supreme Judicial Court, purporting to be written by one of its justices, at the referral of its Chief Justice, and "in behalf of the members of the court who joined in the opinion".

See Jurisdictional Statement, page 18.

This letter, which is as official and definite as could be reasonably required by any judicial body, positively states that the court opinion "rules, and was intended to rule, that G.L. c. 90, §§20 and 20A, as amended, and as applied to the facts of record, was valid and constitutional under the Fourteenth Amendment of the Federal Constitution as well as under comparable provisions of the Constitution of the Commonwealth."

See *Whitney* v. *California* (1926) 274 U.S. 357, 361.

There is nothing in Appellant's interpretation as to timely raising of the questions, or in the record itself, to indicate that the facts stated in the letter of the Supreme Judicial Court were incorrect or subject to question.

Although it is conceded that the Massachusetts Court's opinion, as expressed and as explained by the letter, makes no reference to the VIth Amendment, the opinion did deal with "right to trial".

See Jurisdictional Statement, p. 14, 16, 17.

It is not conceded that Appellant's Motion, made in the trial court, failed to raise this question by implication if not expressly. The right to trial, and suggestions of effective deprivation thereof, were clearly set forth in that motion at that early stage in the proceedings.

Jurisdictional Statement, p. 5, 6.

II. The Appeal Does Present a Substantial Federal Question.

Appellant believes that he has fully and adequately dealt with this topic in his Jurisdictional Statement, pages 8 to 13, and that none of the contentions of the Commonwealth, raised in the *Motion To Dismiss*, require additional response in this statement.

Conclusion

For the reasons set forth in the Jurisdictional Statement and this Opposition to the Motion to Dismiss it is prayed that this Court note probable jurisdiction.

Respectfully submitted,

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